Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of **Distribution of 2004-2009 Cable Royalty Funds**	**No. 2012-6 CRB CD 2004-2009 (Phase II)**
In the Matter of **Distribution of 1999-2009 Satellite Royalty Funds**	**No. 2012-7 CRB SD 1999-2009 (Phase II)**
In the Matter of **Distribution of 2010-13 Cable Royalty Funds**	**No. 14-CRB-0010-CD (2010-13)**
In the Matter of **Distribution of 2010-13 Satellite Royalty Funds**	**No. 14-CRB-0011-SD (2010-13)**

JOINT OPPOSITION TO INDEPENDENT PRODUCERS GROUP AND MULTIGROUP CLAIMANTS' EMERGENCY MOTIONS FOR STAY OF PROCEEDINGS PENDING RESOLUTION OF WORLDWIDE SUBSIDY GROUP V. HAYDEN

The Motion Picture Association of America, Inc. ("MPAA") and the Settling Devotional Claimants ("SDC") hereby oppose the Motion for Stay of Proceedings Pending Resolution of *Worldwide Subsidy Group, LLC v. Hayden* ("*WSG v. Hayden*"), filed by Independent Producers Group ("IPG") (a dba of Worldwide Subsidy Group, LLC) or Multigroup Claimants ("MGC") in each of the above-captioned proceedings.

The case that IPG filed in U.S. District Court for the District of Columbia is without legal basis. By the express provisions of the Copyright Act of 1976, as amended, 17 U.S.C. § 803(d), jurisdiction to review the Judges' determinations lies in the D.C. Circuit after publication of a final decision, not in the district court any time a participant wishes to challenge an interlocutory ruling. Even if the district court had such jurisdiction, IPG and MGC have shown no likelihood of success on the merits; they have shown no irreparable injury or other prejudice that would result if these cases were allowed to proceed to a final determination before review, as contemplated by the Copyright Act; and they have shown no reason why a challenge to the Judges' *Memorandum Opinion and Ruling on Validity and Categorization of Claims* ("*Ruling on Claims*"), which was decided more than two and a half years ago on March 13, 2015, and as to which the Judges denied reconsideration in relevant part on April 9, 2015, and June 1, 2016, presents an "emergency" today. Further, on May 5, 2017, and without a hint of any other litigation to come, MGC moved on an expedited basis for a continuance of the deadline for filing of written direct statements in the 2010-2013 Distribution Phase Proceeding. The Judges granted that continuance in part, ultimately setting December 22, 2017, as the deadline to file written direct statements. Now, MGC moves for another, indefinite delay in the filing of these cases, without even explaining why it waited another seven months to seek an indefinite stay. This motion should be denied.

A. IPG Has Filed Its Complaint in a Court Without Jurisdiction.

Review under the Administrative Procedure Act is only available for "final agency action for which there is no other adequate remedy in a court …." *See* 5 U.S.C. § 704. Here, interlocutory orders of the Copyright Royalty Judges do not constitute final agency action.

Indeed, the Librarian of Congress, the lead defendant in *Worldwide Subsidy Group v. Hayden*, has yet to act in these matters at all.

Moreover, IPG will have an adequate remedy in the U.S. Court of Appeals for the D.C. Circuit, *the exclusive venue for challenges such as those that IPG seeks to bring*. It is well settled that the district court lacks jurisdiction in an Administrative Procedure Act action where Congress has provided for a statutory review scheme as the exclusive means for judicial review of agency action. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) ("Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history … and whether the claims can be afforded meaningful review") (citations omitted); *Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015) ("If a special statutory review scheme exists, … 'it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies'"); *see also Bombardier v. Dep't of Labor*, 145 F.Supp.3d 21, 42 (D.D.C. 2015) (dismissing APA challenge to pending administrative proceeding where statutory review would be available in court of appeals after a final determination). The Copyright Act vests judicial review of decisions of the Copyright Royalty Judges in the U.S. Court of Appeals for the D.C. Circuit. 17 U.S.C. § 803(d) ("Any determination of the Copyright Royalty Judges under subsection (c) may, within 30 days after the publication of the determination in the Federal Register, be appealed, to the United States Court of Appeals for the District of Columbia Circuit ….") . The challenges raised in IPG's complaint can be raised before the D.C. Circuit after a final determination has been issued and published. *See, e.g.*, *Independent Producers Group v. Librarian of Congress*, 792 F.3d 132 (D.C. Cir. 2015) (affirming discovery sanctions against IPG and disqualification of IPG claimants in the 2000-03 cable case):

> We conclude that the orders are subject to judicial review as part of the Board's final determination. … Such interlocutory orders in an agency proceeding are normally reviewable at the end of the proceeding. … The parties point to nothing in the Copyright Act that suggests that the Board's interlocutory orders are subject to a different rule. If we were to conclude otherwise, we would frustrate the statutory scheme for judicial review of royalty fee distribution proceedings.

792 F.3d at 138 (citations omitted). Neither in their motions for stay nor in IPG's complaint and motion for temporary restraining order in federal court has IPG or MGC offered any reason why the district court would have jurisdiction in light of the clear statutory review scheme established by Congress for determinations by the Judges.

B. IPG and MGC Cannot Show a Likelihood of Success on the Merits.

The D.C. Circuit (if and when the case eventually reaches it) will "review the Board's determination that IPG did not comply with its discovery obligations with 'extreme deference' because the 'conduct and extent of discovery in agency proceedings is a matter ordinarily entrusted to the expert agency in the first instance.'" *Id.* at 138-39 (citing *Hi–Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 789 (D.C. Cir. 2000)). IPG has failed to make any showing that a court—much less one that lacks jurisdiction—is likely to find that the Judges failed to meet this deferential standard where IPG had notice and an opportunity to be heard with regard to its blatant discovery violation, and where the Judges have considered and denied two motions to reconsider this very issue.

Similarly, the D.C. Circuit (if and when the case eventually reaches it) will apply a deferential standard in its review of the Judges' decision not to afford IPG's claims a presumption of validity. As the Court has already observed with regard to IPG's similar challenge in the 2000-03 cable case:

> IPG's contention fails because the Board did not in fact apply different standards to IPG and MPAA. The Board's practice was first to require a

> minimum level of documentation and then to request more if any evidence called "into question" a participant's authority to act as an agent, such as "a disavowal of representation by an underlying claimant or evidence that the claimant is represented by another party." … The Board's decision to require additional documentation from IPG but not from MPAA was therefore not arbitrary and capricious, or a violation of due process.

Id. at 140-41 (citations omitted). Again, IPG has presented no basis to believe that a court—much less one that lacks jurisdiction—is likely to find that the Judges have failed to clear this deferential bar, particularly in light of the strong evidence of perjury and false claims presented in the 2004-09 cable and 1999-2009 satellite case.

C. IPG and MGC Have Not Shown Irreparable Injury or Other Prejudice Warranting a Stay.

Even if the district court had jurisdiction, and even if IPG were able to show a likelihood of success on the merits, IPG and MGC have shown no reason why a stay should be entered pending judicial review. Judicial review ordinarily follows a final determination, and is generally not available before agency proceedings are complete. Any injury is reparable: if IPG's challenges ultimately are successful, then it will prevail. "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (quoting *Renegotiation Bd. V. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)). There is no reason to "to short-circuit the administrative process through the vehicle of a district court complaint" just because IPG would prefer to handle things in a different order. *Jarkesy*, 803 F.3d at 15 (quoting *Sturm, Ruger & Co., Inc. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002)). Indeed, a stay of pending proceedings would serve only to delay the ultimate resolution of this matter and the judicial review that IPG apparently intends to seek. *See* IPG's Opposition to SDC's Motion for Final Distribution of 2000 Satellite Royalties (filed Dec. 5, 2017) at 3.

What is more, when the Judges ruled on MGC's expedited motion to continue the filing deadline for direct statements in the 2010-2013 Distribution Phase, they stated:

> Pendency of the claims motions would not have *required* the Judges to grant a continuance prior to the deadline for filing WDS-Ds, though they could have granted a continuance in their discretion. Consequently, the Judges find the pendency of the claims motions to be an insufficient justification for MGC's failure to file its WDS-D on time.

Order Granting in Part MGC's Expedited Motion to Continue Distribution Proceeding Following Resolution of Pending Motions, Nos. 14-CRB-0010-CD (2010-2013) and 14-CRB-0011-SD (2010-13) (Aug. 11, 2017) ("*Continuance Order*") at 4. In short, regardless how the IPG and MGC challenges to the *Ruling on Claims* proceed, there is no necessity to suspend the deadlines in these two proceedings, both of which relate to the Judges' determining the proper methodology or methodologies for allocating shares among the competing parties. If IPG and MGC were somehow successful in their efforts, the Judges would be able to address the handling of the claims issues at that time.

D. There Is No "Emergency."

MPAA and the SDC have gone out of their way to file this opposition in an expeditious manner because IPG and MGC designated their motions to stay as "emergency" motions. To be sure, when true emergencies unexpectedly arise, it is important for the parties and the Judges to be able to respond to them quickly. It is also important, however, to call out those parties who use the "emergency" designation abusively, because unwarranted cries of "Wolf!" inhibit responses to true emergencies. IPG's motion does not even remotely present an "emergency."

The only order that IPG directly challenges in *WSG v. Hayden* is the *Ruling on Claims*, decided more than two and a half years ago, together with the Judges' denials of reconsideration in relevant part on April 9, 2015, and June 1, 2016. If IPG believes that judicial review of this

interlocutory decision is available before a final determination is issued, it gives no reason why it waited more than two and a half years, until December 8, 2017, to seek such review.

Moreover, the hearings in these cases are months away, with the hearing in the 2004-09 cable and 1999-2009 satellite Phase II case commencing on April 9, 2018, and the hearing in the 2010-13 cable and satellite distribution phase cases commencing on August 13, 2018. A final determination is not imminent.

But on December 14, 2017, the day before Written Rebuttal Statements in the 2004-09 cable and 1999-2009 satellite proceedings were due on December 15, 2017, counsel for IPG wrote to counsel for MPAA and SDC, stating bluntly, "In light of the fact that any proceedings will likely be mooted by WSG's action in U.S. District Court or WSG's motion for a stay to the CRB, WSG will not be filing a written rebuttal statement in the foregoing proceeding that would otherwise be filed tomorrow, on December 15, 2017." *See* Exhibit A. IPG's counsel invited MPAA and SDC also not to file Written Rebuttal Statements, stating that "WSG will not challenge any delayed filing of a written rebuttal statement by either the MPAA or SDC pending a determination by the U.S. District Court as to whether a TRO will issue, or a ruling by the CRB on WSG's motion for a stay."

As the SDC's counsel and MPAA's counsel quickly replied, the parties do not have a right to grant themselves a stay or extension unilaterally. The fact that this tactic worked once before for MGC is no reason that it should work again this time around. *See Continuance Order* at 4 ("The fact that MGC sought an extension in advance of the deadline did not suspend MGC's obligations under the scheduling order entered in the proceeding. … [I]t would have been more prudent for MGC to prepare and file its WDS-D in anticipation of the possibility that the Judges would deny the Motion ….").

IPG and MGC have presented no reason why the deadline of December 15, 2017, for filing of Written Rebuttal Statements in the 2004-09 cable and 1999-2009 satellite proceedings, or the deadline of December 22, 2017, for filing of Written Direct Statements in the 2010-13 cable and satellite cases, should be stayed, further upending and delaying the schedules set by the Judges. Nor do they present any reason why poor planning on their part should constitute an emergency on the Judges' part.

Finally, IPG and MGC claim that the Judges granted two prior stays pending litigation: in the 1998-1999 Phase II proceeding and in the 2000-2003 Phase II proceeding. Motion at 3. The first is inapposite, and the second is an invention.

In the 1998-1999 Phase II distribution proceeding, IPG had filed a lawsuit seeking to determine the validity and scope of its settlement agreement with MPAA and the Librarian of Congress in the wake of Raul Galaz's criminal conviction and the termination of its 1997 appeal. The SDC and MPAA, both opposing parties to IPG in the 1998-1999 Phase II proceeding, supported a stay, because each believed that the settlement agreement resolved all disputes they had with IPG in connection with the 1998-1999 royalty claims. In this "unusual and narrow set of circumstances," the Judges granted the stay without objection. *Order Granting Motions to Stay*, No. 2008-1 CRB CD 98-99 (July 23, 2008) ("IPG has filed two lawsuits … regarding the legitimacy and scope of the 1997 Phase II proceeding settlement [between IPG, MPAA, and the Register of Copyrights]. … [T]he present case presents an unusual and narrow set of circumstances that requires an unusual remedy."). Here, in contrast, the court ruling that IPG seeks would not end the proceedings, but would only extend them.

IPG and MGC's assertion that a comparable stay was granted in the 2000-2003 Phase II proceeding is simply false. There was no stay in the 2000-2003 Phase II proceeding, much less

one that justifies the instant relief IPG and MGC seek. In fact, IPG requested that the Judges suspend and recommence the negotiation period in that proceeding, but the Judges denied that motion. *Order Denying IPG's Motion to Suspend and Recommence Negotiation Period*, No. 2008-2 CRB CD 2000-2003 (Phase II) (Dec. 5, 2011). In short, nothing comparable to the IPG and MGC request was approved by the Judges in that case.

CONCLUSION

For the foregoing reasons, the Judges should deny IPG's and MGC's motions to stay proceedings pending resolution of *WSG v. Hayden*.

Respectfully submitted,

PROGRAM SUPPLIERS

/s/ Gregory O. Olaniran
Gregory O. Olaniran
D.C. Bar No. 455784
Lucy Holmes Plovnick
D.C. Bar No. 488752
Alesha M. Dominique
D.C. Bar No. 990311
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street N.W., 8th Floor
Washington, D.C. 20036
Telephone: (202) 355-7817
Fax: (202) 355-7887
goo@msk.com
lhp@msk.com
amd@msk.com

SETTLING DEVOTIONAL CLAIMANTS

/s/ Jessica T. Nyman
Arnold P. Lutzker
DC Bar No. 101816
Benjamin Sternberg
DC Bar No. 1016576
Jeannette M. Carmadella
DC Bar No. 500586
LUTZKER & LUTZKER LLP
1233 20th Street, NW, Suite 703
Washington, DC 20036
Telephone: (202) 408-7600
Fax: (202) 408-7677
arnie@lutzker.com
ben@lutzker.com
jeannette@lutzker.com

Clifford M. Harrington
DC Bar No. 218107
Matthew J. MacLean
D.C. Bar No. 479257
Michael A. Warley
D.C. Bar No. 1028686
Jessica T. Nyman
D.C. Bar No. 1030613
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Telephone: (202) 663-8525
Fax: (202) 663-8007
clifford.harrington@pillsburylaw.com
matthew.maclean@pillsburylaw.com
Michael.warley@pillsburylaw.com
Jessica.nyman@pillsburylaw.com

Dated: December 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 2017, a copy of the foregoing filing was provided electronically and sent by Federal Express overnight to the parties listed below: below:

INDEPENDENT PRODUCERS GROUP
MULTIGROUP CLAIMANTS
SPANISH LANGUAGE PRODUCERS

Brian D. Boydston
PICK & BOYDSTON LLP
10786 Le Conte Avenue
Los Angeles, CA 90024

NATIONAL ASSOCIATION OF BROADCASTERS
COMMERCIAL TELEVISION CLAIMANTS

John I. Stewart, Jr.
David Ervin
Ann Mace
Emily S. Parsons
Crowell & Moring, LLP
1001 Pennsylvania Ave, NW
Washington, DC 20004-2595

AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS

Samuel Mosenkis
ASCAP
One Lincoln Plaza
New York, NY 10023
Telephone: (212) 621-6450

SESAC, INC.

John C. Beiter
Leavens, Strand & Glover, LLC 47 Music
1102 17th Avenue South
Suite 306
Nashville, TN 37212
Telephone: (615) 341-3457

Christos P. Badavas
SESAC
152 West 57th Street
57th Floor
New York, NY 10019
Phone: (212) 586-3450

CANADIAN CLAIMANTS GROUP

L. Kendall Satterfield
Satterfield PLLC
1629 K Street, NW
Washington, DC 20006

Victor J. Cosentino
Larson & Gaston LLP
200 S. Los Robles Ave., Suite 530
Pasadena, CA 91101

PUBLIC TELEVISION CLAIMANTS
PUBLIC BROADCASTING SERVICE

Ronald G. Dove, Jr.
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20268
Telephone: (202) 662-5685

R. Scott Griffin
PUBLIC BROADCASTING SERVICE
2100 Crystal Drive
Arlington, VA 22202-3785
Telephone: (703) 739-8658

BROADCAST MUSIC, INC.

Joseph J. DiMona
BROADCAST MUSIC, INC.
7 World Trade Center
250 Greenwich Street
New York, NY 10007-0030
Telephone: (212) 220-3149

Brian Coleman
DRINKER BIDDLE & REATH LLP
1500 K Street, NW – Suite 1100
Washington, DC 20005
Telephone: (202) 842-8800

PROFESSIONAL BULL RIDERS

Arnold P. Lutzker
LUTZKER & LUTZKER LLP
1233 20th Street, NW, Suite 703
Washington, DC 20036
Telephone: (202) 408-7600

ARENA FOOTBALL ONE, LLC
MAJOR LEAGUE SOCCER

Edward S. Hammerman
HAMMERMAN PLLC
5335 Wisconsin Avenue, N.W., Suite 440
Washington, D.C. 20015-2054
Tel: (202)686-2887

NATIONAL PUBLIC RADIO

Gregory A. Lewis
NATIONAL PUBLIC RADIO
1111 North Capitol Street, NE
Washington, DC 20002
Tel: (202) 513-2050

/s/ Jessica T. Nyman
Jessica T. Nyman

EXHIBIT A

From:	Plovnick, Lucy
To:	MacLean, Matthew J.; Brian D. Boydston, Esq.; Olaniran, Greg; Harrington, Clifford M.; arnie@lutzker.com
Subject:	RE: Consolidated Docket Nos. 2012-6 CRB CD 2004-(Phase II) 2012-7 CRB SD 1999-2009-(Phase II) (Remand)
Date:	Thursday, December 14, 2017 12:40:18 PM

MPAA will also be filing our Written Rebuttal Statement tomorrow, as is required by the Judges' scheduling order. We agree with SDC that no party can unilaterally grant themselves either a stay of the Judges' orders, or a deadline extension.

Lucy

Lucy Holmes Plovnick | Partner, through her professional corporation
T: 202.355.7918 | lhp@msk.com
Mitchell Silberberg & Knupp LLP | www.msk.com
1818 N Street NW, 8th Floor, Washington, DC 20036

From: MacLean, Matthew J. [mailto:matthew.maclean@pillsburylaw.com]
Sent: Thursday, December 14, 2017 12:37 PM
To: Brian D. Boydston, Esq.; Olaniran, Greg; Plovnick, Lucy; Harrington, Clifford M.; arnie@lutzker.com
Subject: RE: Consolidated Docket Nos. 2012-6 CRB CD 2004-(Phase II) 2012-7 CRB SD 1999-2009-(Phase II) (Remand)

Brian,

The deadline is tomorrow. We intend to file SDC's written rebuttal statement tomorrow. The parties do not have the right to grant themselves a stay unilaterally.

Matt

Matthew J. MacLean | Partner
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street NW | Washington, DC 20036-3006
t 202.663.8183
matthew.maclean@pillsburylaw.com

-----Original Message-----
From: Brian D. Boydston, Esq. [mailto:brianb@ix.netcom.com]
Sent: Thursday, December 14, 2017 12:32 PM
To: goo@msk.com; lhp@msk.com; Harrington, Clifford M. <clifford.harrington@pillsburylaw.com>; MacLean, Matthew J.

<matthew.maclean@pillsburylaw.com>; arnie@lutzker.com
Subject: Consolidated Docket Nos. 2012-6 CRB CD 2004-(Phase II) 2012-7 CRB SD 1999-2009-(Phase II) (Remand)

Counsel,

As you are aware, on December 8, 2017, Worldwide Subsidy Group LLC dba Independent Producers Group ("WSG") filed a complaint in the U.S. District Court for the District of Columbia relating to the above proceeding. In connection therewith, WSG is seeking a temporary restraining order that would stay the above proceeding. Both the MPAA and the SDC were provided courtesy copies of the various pleadings upon their filing with the U.S. District Court prior to formal service of those documents, in order to provide all parties ample opportunity to address such filings. WSG additionally filed a motion to stay such proceeding with the Copyright Royalty Board, which was served on both the MPAA and the SDC.

WSG is now awaiting contact as to when a TRO hearing will go forward. In light of the fact that any proceedings will likely be mooted by WSG's action in U.S. District Court or WSG's motion for a stay to the CRB, WSG will not be filing a written rebuttal statement in the foregoing proceeding that would otherwise be filed tomorrow, on December 15, 2017. In order to avoid any accusation that WSG sought to have the adverse parties "show their hand", we are informing you that WSG will not challenge any delayed filing of a written rebuttal statement by either the MPAA or SDC pending a determination by the U.S. District Court as to whether a TRO will issue, or a ruling by the CRB on WSG's motion for a stay.

Brian Boydston
Counsel for Worldwide Subsidy Group

Certificate of Service

I hereby certify that on Friday, December 15, 2017 I provided a true and correct copy of the MPAA and SDC Joint Opposition to IPG and MGC Emergency Motions for Stay to the following:

MPAA-Represented Program Suppliers, represented by Lucy H Plovnick served via Electronic Service at lhp@msk.com

Independent Producers Group (IPG), represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Signed: /s/ Jessica T Nyman